

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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:
DIANE TREJOS, et al., :
: 08-CV-1477
Plaintiffs, :
:
v. :
: 225 Cadman Plaza East
EDITA'S BAR AND RESTAURANT, INC., : Brooklyn, New York
et al., :
:
Defendants. : October 20, 2008
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TRANSCRIPT OF CIVIL CAUSE FOR PLAINTIFF'S MOTION FOR
PROTECTIVE ORDER
BEFORE THE HONORABLE STEVEN M. GOLD
UNITED STATES CHIEF MAGISTRATE JUDGE

APPEARANCES:

For the Plaintiffs: JENNIE WOLTZ, ESQ.

For Defendants: RICHARD GOLDBERG, ESQ.

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1 (Proceedings began at 3;44 p.m.)

2 THE COURT: Civil Cause for Plaintiff's Motion for
3 Protective Order, Trejos et al. v. Edita's Bar and Restaurant,
4 et al., 08-CV-1477.

5 Who will be arguing for the plaintiffs?

6 MS. WOLTZ: I will, Your Honor. My name is Jennie
7 Woltz. I'm an attorney for Milbank, Tweed, Hadley & McCoy.

8 THE COURT: How are you? Woltz is it?

9 MS. WOLTZ: Yes, W-O-L-T-Z.

10 THE COURT: Nice to see you. For the defendants who
11 will be arguing?

12 MR. GOLDBERG: Richard Goldberg, Your Honor, for
13 Shelley Curto, [inaudible] Schwartz, Mineo & Cohen. We
14 represent the defendants.

15 THE COURT: So as I understand it the issues that are
16 really driving this controversy can be boiled down to the
17 discoverability of plaintiffs' tax returns, questioning of
18 plaintiffs about their tax returns and whether they filed or
19 not, the discovery of plaintiffs' immigration, travel, working
20 paper authorization documents and information or questions
21 about when the plaintiffs were in the United States or not.
22 Those are sort of the way -- that's sort of the way I've
23 broken it down into four different topics.

24 So if that helps -- you don't have to stay within
25 that rubric but if you want to get out of it maybe you can

1 tell me what rubric you would like me to approach it from and
2 with that in mind, I'll hear from movant plaintiffs.

3 MS. WOLTZ: Thank you, Your Honor. The plaintiffs'
4 motion for a protective order should be granted for three
5 reasons. The first reason is that the information that the
6 defendants have sought through the discovery of tax returns,
7 passports, visas, et cetera are -- the reasons are irrelevant
8 and overbroad and are -- and most of the information that
9 defendants attempt to seek through these documents they won't
10 actually find on the documents. For instance, most of the
11 reasons that the plaintiff -- excuse me, the defendants have
12 sought these documents or questioning about these documents
13 has to do with dates and hours that the plaintiffs have worked
14 but tax returns don't show this information. Passports are
15 far too overbroad to show this information.

16 The second reason is that any relevant information
17 which might be obtained is far outweighed by the in terrorem
18 effect of discovery of these documents. These documents are
19 in addition -- if they were discovered or discussed at all not
20 only would they reveal instantly plaintiffs' immigration
21 status but it will also reveal socioeconomic status, marital
22 status, home ownership status, whether they've made
23 investments, things in tax returns that one would normally
24 see.

25 THE COURT: That's easily solved by redacting the tax

1 returns to limit it to earned income.

2 MS. WOLTZ: That is one option, Your Honor.

3 However --

4 THE COURT: What's your position on whether the
5 plaintiffs can be asked whether they filed tax returns or not?

6 MS. WOLTZ: We do not believe that this is an
7 appropriate question that the defendants should be able to
8 ask. If this were an appropriate question then every
9 plaintiff, every witness who appeared in any court in any type
10 of subject matter action could be asked whether they filed tax
11 returns and simply because someone hasn't filed tax returns
12 doesn't make them incredible.

13 THE COURT: In the Schnapkova [Ph.] case, are you
14 familiar with that case, Second Circuit case that Judge Levy
15 cites in the case that you cited to me, I believe, the Judge
16 Levy case being Michalski [Ph.]. You cited Michalski to me I
17 believe and it cites the Schnapkova case. In Schnapkova, the
18 Second Circuit reversed a defendant's -- excuse me, a
19 plaintiff's verdict because the District Court in a personal
20 injury action granted an objection by the plaintiff to the
21 question about whether or not the plaintiff filed tax returns
22 and that had nothing to do with income. That had nothing to
23 do with wages and hours. It was an accident on the job and he
24 sued for negligence for personal injuries. He was asked, did
25 you file tax returns. The District Court wouldn't allow the

1 question, the Second Circuit reversed and said that goes to
2 credibility, the plaintiff's credibility is an issue, and the
3 trial court abused its discretion in sustaining an objection
4 to that line of questioning.

5 Here, the plaintiff's credibility is key because
6 everybody agrees at least with respect to the dancers that
7 there's no documents at all other than when they went to the
8 bathroom and what videos may or may not have captured. I take
9 it you're not going to limit the plaintiffs' claims to the
10 hours that are documented on the defendants' bathroom logs;
11 right?

12 MS. WOLTZ: Depending on how full these bathroom logs
13 and the sign-in/sign-out logs are. I think one of the main
14 points that needs to be underscored in this case is that
15 defendants haven't produced these documents yet. The
16 plaintiff served document requests on defendants more than
17 four months ago. Because the defendants haven't shown us what
18 these documents contain how are we to -- how are we to figure
19 out if they are sufficient. We have to assume at the moment
20 that they are -- since they've admitted to maintaining them in
21 both their answer and in their amended answer that they are
22 maintained.

23 But, furthermore, Your Honor --

24 THE COURT: How do you deal with the tax filing
25 issue? I mean I'm kind of sympathetic to the argument that

1 witnesses ought not to be asked that. I was sort of surprised
2 to see that Second Circuit case but I can't see it overruled
3 and, in fact, I've seen it applied in subsequent case law.

4 MS. WOLTZ: Your Honor, the -- on the issue of tax
5 returns, an in terrorem effect also can weigh against the
6 party's ability to test for credibility and we think in this
7 case it is distinguishable from the Schnapkova case in that
8 there's more at stake here for these plaintiffs.

9 THE COURT: Why?

10 MS. WOLTZ: These plaintiffs risk -- whether or not
11 these plaintiffs have filed tax returns is also going to be --
12 may shed light on their immigration status again and may
13 produce an in terrorem effect.

14 THE COURT: In the Judge Lindsay/Judge Seybert cases
15 that you cited to me, they were also dealing with the in
16 terrorem effect of immigration questioning, right?

17 MS. WOLTZ: Yes.

18 THE COURT: Do you know the cases I'm speaking of? I
19 can find them for you if it would be helpful. It's the EEOC,
20 the First Wireless Group cases and there are two of them.
21 There, the tax returns were not ordered produced. The
22 immigration status was protected. The in terrorem effect of
23 immigration status discovery was acknowledged but the
24 plaintiffs were required to answer questions about whether or
25 not they filed tax returns.

1 MS. WOLTZ: In the Rangifo [Ph.] case, however, which
2 we've also cited to you, they weren't.

3 Your Honor, I think the --

4 THE COURT: The weight of authority seems to be
5 against you on that question. Go ahead.

6 MS. WOLTZ: The other thing that I want to just
7 underscore with regard to the tax returns is that the -- how
8 do I say this?

9 THE COURT: It's up to you.

10 MS. WOLTZ: Tax returns should not be compelled in
11 this case simply to test the credibility of the plaintiff.
12 There's other ways to test the credibility in this case. I
13 mean the defendants will have the logbooks assuming that they
14 are complete. They'll have the bathroom logs. They simply
15 just don't need this prejudicial forum of questioning to test
16 credibility in this case. I think that that's the most
17 salient piece here.

18 THE COURT: Let me ask you about the -- actually in
19 the Rangifo case what Judge Ellis protected was the tax ID
20 number and social security number. I don't think the opinion
21 speaks directly about whether or not they filed tax returns.
22 Can you show me a portion of his opinion that you cited where
23 the judge upheld or addressed even the discoverability of
24 whether or not tax returns were filed?

25 MS. WOLTZ: Excuse me, Your Honor. I may have gotten

1 confused.

2 THE COURT: It's okay. I just want to make sure the
3 record is clear before we leave it. Take your time. It's a
4 short opinion, at least the one I'm looking at, the one that's
5 reported at 2007 Westlaw 894376.

6 [Pause in proceedings.]

7 MS. WOLTZ: Your Honor, I don't have the opinion on
8 me.

9 THE COURT: I'll lend you my copy to make sure it's
10 the one you're thinking about and see if I'm overlooking
11 something where in fact it holds that whether one filed tax
12 returns or not is not discoverable as you suggest.

13 [Pause in proceedings.]

14 MS. WOLTZ: Your Honor, on Page 3 of the Rangifo
15 decision the party had -- excuse me, the tax returns are being
16 compelled to test the credibility of the plaintiffs. However,
17 the Court says that the opportunity to test the credibility of
18 a party based on representations made when seeking employment
19 does not outweigh the chilling effect that disclosure of
20 immigration status has on the employees when seeking to
21 enforce their rights.

22 THE COURT: So it doesn't address the question of
23 whether at a deposition the plaintiff may be asked did you
24 file a tax return reflecting the income that you earned while
25 you were working for me. It doesn't address that question.

1 MS. WOLTZ: Not directly but the idea is that the
2 credibility should not be tested.

3 THE COURT: I think the idea is that the credibility
4 should not be tested by access to the tax ID number which
5 would go to immigration status, not the filing or failure to
6 file. I agree with you that intellectually they are analogous
7 but the case law does seem to draw a distinction between them.

8 Before I give the defendants the floor, I would like
9 to ask you one other question. We can certainly agree, I
10 think, that one of the disputes in this case that we're
11 entitled -- both sides are entitled to discover are what the
12 claims are about what hours were worked and what evidence
13 there is about what hours were worked.

14 MS. WOLTZ: That is true.

15 THE COURT: The defendant has asserted or the
16 defendants have asserted, excuse me, that they have a good
17 faith basis for believing that the plaintiffs were out of the
18 country or some plaintiffs were traveling outside of the
19 country during part of the time that they were claiming to be
20 working for the defendants.

21 I understand and I appreciate the briefing that
22 brought sharper into focus the question of the in terrorem
23 effect of questioning and document production going to
24 immigration status, but what would the plaintiffs' position be
25 if we were to craft a vehicle for the communication of the

1 information about travel without communication about
2 immigration status? In other words, I would propose that the
3 plaintiffs be required to sit down with their counsel with all
4 documents, whether they include passports or what have you,
5 and I don't know how the plaintiffs traveled and I'm not
6 asking, but all documents that they have reflecting any travel
7 and that plaintiffs' counsel be prepared to certify or have
8 plaintiffs submit affidavits -- I'd be open as to the vehicle
9 where they can say we instructed the client, we received a
10 volume of documents, we reviewed the documents and the travel
11 reflected is the following, and that that way the travel
12 information on any travel documents, whether they're in the
13 plaintiffs' own name or not, whether they're in the country of
14 origin that they represented or not, whether they're under an
15 A number or not can be revealed without disclosure of the
16 underlying immigration related data.

17 MS. WOLTZ: Your Honor, I think that that's an
18 excellent suggestion. The plaintiffs would have no problem
19 getting a vehicle out to show how they traveled. But it is
20 still overbroad in terms of when the plaintiffs were indeed at
21 work or not.

22 THE COURT: Why? If they're claiming that they were
23 at work forty hours a week fifty weeks a year and they
24 traveled six months a year, how is that overbroad?

25 MS. WOLTZ: I see your -- I see what you mean, Your

1 Honor.

2 THE COURT: Okay.

3 MS. WOLTZ: So you would leave that to the parties to
4 negotiate that?

5 THE COURT: Can I hear from the defendants?

6 I'll give you a ruling before we leave today but
7 that's where I'm headed and I want to give you an opportunity
8 to tell me if you see a problem with it.

9 MR. GOLDBERG: Thank you, Your Honor. Richard
10 Goldberg.

11 THE COURT: Mr. Goldberg.

12 MR. GOLDBERG: If I could hand up, Your Honor, it
13 might be helpful. These are the documents that we did get
14 from the plaintiffs which we referred to the brief which you
15 have before you.

16 THE COURT: Thank you. I understand you haven't
17 gotten anything yet. You haven't given anything yet either;
18 right?

19 MR. GOLDBERG: Well, I think Your Honor at the last
20 conference indicated it would be a mutual swap and that's
21 where we --

22 THE COURT: So you've been waiting for this ruling,
23 is that it?

24 MR. GOLDBERG: I thought that we -- we thought that
25 when you had the telephone conference that's what you were

1 doing, we would --

2 THE COURT: Okay. We'll set a date for you to meet
3 with each other's documents.

4 MR. GOLDBERG: Fine. I think first on the issue --
5 let me take it a little bit in reverse. Your Honor just
6 indicated the matter of the travel documents. I think we
7 actually addressed that at Page 16 of our reply, sur reply,
8 I'm sorry, at the bottom where we said and I'll quote
9 "Defendants could care less whether the plaintiffs are
10 immigrants." The in terrorem effect here is a red herring.
11 We are not interested in the plaintiff's immigration status.
12 We are, however, very interested in where they were and the
13 passport part of the document that has the stamp that shows
14 you you're in and out of the country, that shows you in one
15 very neat place where you were and where you were is important
16 to determine part of their own economic reality test which has
17 to do with permanence of the employment, dependence on the
18 employment. These issues of the economic reality test, which
19 is only one part of the case, are incredibly fact sensitive.
20 They can be manipulated, massaged in all sorts of ways. You
21 can wordsmith them. You can show, draw all kinds of
22 conclusions based on the different prongs of the economic
23 reality test.

24 One of the leading parts of that prong, one of the
25 leading prongs of the test, I'm sorry, is whether you are

1 dependent on the employment that you have and dependency on
2 employment is one of the key issues to show whether or not you
3 are an employee. Dependency on employment has to do very much
4 with well, where else are you employed and what do you earn at
5 those other places.

6 All of the documents that they agree to give us in
7 the document requests all have to do with information that I
8 would call internal information about what they say we paid
9 them but every inquiry we make by tax return, loan document,
10 application for loans, application for social services
11 assistance where the question would be put likely and asked in
12 any of those documents where else do you work, what do you
13 earn. They say in this motion that they're not going to give
14 it to us and that's in Document Request 1, 2, 36, 38, 39, 42
15 and 43. Those are the only places where I believe if I look
16 at it again we have asked what other documents do you have
17 that shed light on your claim about where you worked, for how
18 long and for how much. Those documents go very much to the
19 question of economic dependence. They go very much to the
20 issue of permanence of employment and other facets of the very
21 economic reality test that they're talking about.

22 Also, those documents also address issues about
23 their actual earnings, what they claimed they earned with us,
24 what they claim they weren't paid by us, how many hours did
25 they work with us. The complaint here alleges hours worked

1 that range from I think thirty, twenty to thirty to a hundred
2 and thirty hours a week. If I read it correctly there's a
3 very wide range of hours. How do we test whether or not that
4 they're claiming that is so? Part of the problem we have --

5 THE COURT: You want documents showing their other
6 employment if they had any?

7 MR. GOLDBERG: Sure. And the tax returns uniquely
8 show that information.

9 THE COURT: If you got a tax return that was redacted
10 to show simply the name of the taxpayer and any information on
11 it declaring any earned income you should be satisfied.

12 MR. GOLDBERG: Yes, and one other possible area that
13 we -- because we don't know what's in that and I don't know
14 the level of sophistication of the tax returns that these
15 people filed. They haven't told us.

16 But take, for example, the issue of the dancer
17 plaintiffs. Now, the very claim we've made in the case is
18 that the dancer plaintiffs are not our employees. In fact, we
19 kept very few records about those. We didn't pay them. The
20 dancer plaintiffs at some juncture began to purchase their own
21 dance dress, their own dance uniforms if you will.

22 THE COURT: You want business expense deductions if
23 they took them.

24 MR. GOLDBERG: Business expense deductions. How did
25 you treat it? Maybe you did, maybe you didn't. Certainly if

1 you did another piece of evidence having to do with employee
2 status. The reason I only bring out that particular fragment
3 is one of the cases that they cite that I think really points
4 it up, there was a case called Twitfort [Ph.] I think, one of
5 the --

6 THE COURT: I didn't focus on that one.

7 MR. GOLDBERG: One of the cases they cited. We talked
8 about it in the reply brief in our sur reply. It's a case
9 involving I think it was tailors who had worked offsite in
10 their own homes producing piece goods for garment "employers."

11 THE COURT: Right.

12 MR. GOLDBERG: What happened was in that case one of
13 the -- the issue was are the tailors under the Fair Labor
14 Standards Act or not. The Court I think held that -- it was a
15 case dealing with the ultimate fact, not discovery, which I
16 want to talk about just briefly at the end. But the case
17 talked about the ultimate fact the Court was being asked to
18 decide the ultimate fact, are they employers or not. One of
19 the tailors there was a fellow named, no relation, Goldberg.
20 Goldberg hired fourteen other tailors and the Court held --
21 asked Goldberg since he hired fourteen other tailors it kind
22 of looks like he's in his own business and therefore certainly
23 he is an independent contractor, but as to the others we're
24 not sure and the Court held that there was only "fragmentary
25 evidence" about what the actual facts were concerning the

1 other alleged employers -- alleged employees and the Court I
2 think ultimately held against the employer defendant because
3 the Court held you only had fragmentary evidence about these
4 issues.

5 The point is is that because these issues are so
6 fact sensitive at the end of the day given the paltry kind of
7 documentation we get concerning these people because they're
8 in control of it, we only have fragmentary evidence and we are
9 seriously prejudiced from a very real evidentiary standpoint
10 because we cannot defend against the claims they're making
11 other than what comes out of their mouth. We have no -- zero
12 documents to really attack those issues substantively and by
13 impeachment.

14 You've already mentioned the point about
15 impeachment. I think it's the Michalski case where the Court
16 held that obviously I think issues about whether you filed a
17 tax return in the first place deal with credibility and
18 whether you make statements in those tax returns I would say
19 that are false or true also go to credibility and are
20 important matters for cross-examination not only for
21 credibility but also substantively to challenge what it is
22 you're saying about where you worked, how long you worked and
23 whether you depended on us.

24 THE COURT: You know about the goose and the gander,
25 right? I lost you but you know what I'm saying. What I'm

1 saying is be careful what you ask for because it will only
2 spawn the same requests of your client that you make of the
3 plaintiffs.

4 MS. WOLTZ: May I respond, Your Honor?

5 THE COURT: When he's done.

6 MR. GOLDBERG: The other thing -- I appreciate that
7 instruction, Your Honor.

8 The other thing that I just want to point out is
9 that to a large degree many of the cases that the plaintiffs
10 cite have to do with what I would call ultimate fact issues
11 where the Court is being asked to determine is this defendant
12 -- is this plaintiff an employee or not. They are not
13 strictly speaking discovery cases --

14 THE COURT: I understand.

15 MR. GOLDBERG: The one case that I have here, Your
16 Honor, which was Sanborski, one of the cases we -- I think
17 both sides may have made reference to it. The Court made a
18 specific reference that the objections were overruled as to
19 the request of discovery drawing the particular distinction
20 that this is only the discovery stage and that there is yet to
21 be further determinations about admissibility of evidence
22 later on but for purposes of preparation of defense discovery
23 is broader and the Court made that distinction.

24 THE COURT: Thank you very much, Mr. Goldberg.

25 Ms. Woltz, you wanted another word?

1 MS. WOLTZ: Yes. Thank you.

2 THE COURT: Please go ahead.

3 MS. WOLTZ: The defendants have made repeated
4 assertions that plaintiffs have failed to produce documents in
5 this case but plaintiffs have actually produced documents
6 responsive to 39 out of defendants' 45 document requests. So
7 we've produced everything that they've asked for except with
8 respect to these seriously prejudicial and irrelevant
9 documents.

10 Secondly, it's irrelevant what the plaintiff --
11 excuse me, what the defendants' motives are for discovering
12 immigration status. These documents will still reveal
13 immigration status and then the in terrorem effect applies.

14 Thirdly, the defendants spent a lot of time
15 discussing what or -- in his oral argument right here that
16 it's very relevant what the plaintiffs have earned but it's
17 not. First of all, there's no debates between the plaintiffs
18 and the defendants that the plaintiffs' dancers have earned
19 nothing from the defendants. They don't dispute that. We
20 don't dispute that.

21 THE COURT: But if they were earning thirty or forty
22 thousand dollars a year from another employer surely it would
23 go to their claim that they were working as many hours as they
24 say they worked for the defendant.

25 MS. WOLTZ: If they earned thirty or forty thousand

1 dollars from the Flamingo you're saying?

2 THE COURT: No, from another employer it would make
3 it less believable that they had the time to work the number
4 of hours that they claim to have spent working for the
5 defendants. None of these plaintiffs are claiming that they
6 worked ten or fifteen hours a week at the defendants, are
7 they?

8 MS. WOLTZ: No, all of them are more than that.

9 THE COURT: Yes. So they --

10 MS. WOLTZ: But why would the amount of what they
11 made at another job -- you don't know what they're getting
12 paid at the other job because they could be making --

13 THE COURT: \$100,000.00 an hour, it's true. I don't
14 know.

15 MS. WOLTZ: Also, I mean the dancer plaintiffs were
16 working at night. They could have had day jobs during the day
17 that would --

18 THE COURT: But it's discovery. They're entitled to
19 find out. That's what I --

20 MS. WOLTZ: It is discovery, Your Honor. However,
21 but this Court must realize that the plaintiffs are entitled
22 to have other jobs. Employees --

23 THE COURT: It's not -- if they have other work and
24 the defense moves for summary judgment on the grounds that the
25 plaintiffs had other employment you may bring a Rule 11 motion

1 if that's the sole basis of their Rule 56 application.

2 MS. WOLTZ: Okay. I just want to impress upon Your
3 Honor that whether the plaintiffs had two different jobs did
4 not make them any less dependent upon the Flamingo for having
5 that job.

6 So I have one more point.

7 THE COURT: Take your time and make it as you like.

8 MS. WOLTZ: Thank you. Defendants have also stated
9 this idea of fragmentary documentary evidence. First of all,
10 we obviously need to see what these logbooks look like. If
11 these logbooks are kept the way that the plaintiffs allege and
12 the defendants admit every single day that the dancer
13 plaintiffs signed in, every time they went to the bathroom
14 there should be a record of it.

15 But, furthermore, because even if we were to -- even
16 if this Court were to order discovery of tax returns the
17 defendants aren't going to get that information from the tax
18 returns. They're not going to get all that information from
19 the passports. So they could win on this but he still won't
20 have all the information they need to make it non fragmentary.
21 That's very relevant. We have to see these documents for what
22 they are and for what they're going to contain.

23 But even if these documents do contain a modicum of
24 relevant information here, there's no case that the plaintiffs
25 have found, no case that the defendants have found that says

1 defendants' failure to maintain documents should be
2 compensated for by plaintiffs revealing sensitive and
3 irrelevant documents.

4 THE COURT: Let's talk about the [inaudible] for a
5 minute. Let's assume I enter an order that says the
6 plaintiffs have to produce any documents they have reflecting
7 the income that they earned -- I don't mean investment income.
8 I mean earned income, wages, salaries, tips, et cetera, the
9 income that they earned and the expenses that they incurred
10 earning them whether it's in tax returns or not, but if it is
11 in tax returns they can redact every other bit of information.

12 The only in terrorem effect of that ruling that I
13 can discern would be that it would force plaintiffs who didn't
14 file tax returns to acknowledge that fact. I'm sensitive to
15 that argument. The problem with it is that the cases that you
16 and I discussed at the beginning of your argument says that
17 that very fact is the one that the defendants are entitled to
18 cross-examine the plaintiffs about anyway. So if I have to
19 allow even if it might not be my preference if I were writing
20 on a clean slate, if I have to allow under Second Circuit rule
21 the question plaintiff A, did you file a tax return for 1997,
22 the first year of your lawsuit. If I have to allow that
23 question at plaintiff A's deposition, how am I further
24 imposing an in terrorem effect if I say if you filed a tax
25 return because the amount of income you declared and the way

1 you declared it and the expenses you declared and the way you
2 declared them is arguably relevant and Rule 26 gives broad
3 discovery and the defendants have crafted the possibility of
4 an argument, how is that additionally in terrorem if it is?

5 MS. WOLTZ: How is it additionally? It would not be.

6 THE COURT: I appreciate your candor. Thank you.

7 Is there anything else you want to tell me?

8 MS. WOLTZ: I think that's it, Your Honor. I think
9 you have understood our points as far as the tax returns even
10 as the way that -- the way that the plaintiff in this case has
11 filled out their tax returns is also only going to be slightly
12 subjective. So even -- it won't be this objective factor that
13 the Court is going to be able to use with sufficient -- it
14 just won't be able to use in the economic reality test. So
15 even with regard to anything they write on their tax return or
16 how they've characterized their income the Court should also
17 be cognizant of that especially considering they're
18 unsophisticated.

19 THE COURT: Thank you. Anything else from the
20 defendant?

21 MR. GOLDBERG: No, Your Honor.

22 THE COURT: Thanks.

23 MR. GOLDBERG: Thank you, Judge.

24 THE COURT: So just to review. If I give you
25 guidance on the four points that I articulated at the

1 beginning and we arrange a date for the mutual exchange of
2 documents I will have covered the issues raised in your
3 motion. You don't need a document demand by document demand
4 ruling or an interrogatory by interrogatory ruling. I think
5 we're agreed on that.

6 MS. WOLTZ: Your Honor, I don't believe the
7 plaintiffs have any more documents responsive to these
8 requests.

9 THE COURT: Other than the ones that are at issue.

10 MS. WOLTZ: Other than the ones that are at issue.

11 THE COURT: I understand that. I'm saying as opposed
12 to going demand by demand as to one, the objection is
13 sustained in part and denied in part for the following reasons
14 as to -- I'd like to give you a generic ruling and allow you
15 to --

16 MR. GOLDBERG: The one I guess area where we weren't
17 just dealing with tax returns, travel documents I believe
18 were -- there were matters regarding loan applications and
19 matters --

20 THE COURT: I'm going to handle that --

21 MR. GOLDBERG: -- and I think the --

22 THE COURT: Got it. I'm going to deal with that.

23 MR. GOLDBERG: -- social services documents which
24 I --

25 THE COURT: I'm going to deal with that. Thank you.

1 MR. GOLDBERG: That's fine, Judge.

2 MR. KUSHNER: If I may, Judge.

3 THE COURT: Sure.

4 MR. KUSHNER: There was a statement --

5 THE COURT: Just tell me who you are.

6 MR. KUSHNER: Gary Kushner for --

7 THE COURT: Mr. Kushner, what?

8 MR. KUSHNER: There was a statement made also in
9 writing before in response to the discovery demand that we
10 were getting 39 categories of documents. What was shown to
11 you earlier today certainly falls short of 39 documents.

12 THE COURT: Thank you.

13 For the reasons I've already stated, I feel bound to
14 consider, to take into account as I make my ruling that a
15 failure to file tax returns is discoverable, admissible and
16 indeed can be the grounds for reversible error if objected to,
17 and therefore the in terrorem effect of tax return disclosure
18 is mitigated if not eviscerated in this case.

19 In reaching that conclusion I look at decisions like
20 the Schnapkova case reported at 985 F.2d 79 with the relevant
21 discussion at Pages 82 and 83, the Chambly v. Harris & Harris
22 case reported at 154 F. Supp. 2d 670 which relied on
23 Schnapkova, the Judge Levy decision in Michalski which is
24 cited by the parties, 935 F. Supp 203 at Page 208, and the two
25 decisions in EEOC v. First Wireless Group authored by Judge

1 Seybert also cited by the parties and reported respectively at
2 225 F.R.D. 404 and 2007 Westlaw 586720.

3 I also take into account the sensitivity with which
4 courts approach immigration status and acknowledge that it
5 stands in some distinction to the way tax filing status is
6 treated but that's the law that I find myself being directed
7 to apply by the Circuit and seen applied by my fellow judges.
8 In particular, I found the discussion in the Flores v. Amagon
9 case reported at 233 F. Supp. 2d 462 about the reasons courts
10 should be sensitive about immigration status to be
11 informative. We also see it in the Wireless Group decisions
12 I've already referenced and in the Rangifo case that Ms. Woltz
13 referred to during her argument.

14 There are indeed cases where even tax returns
15 themselves have been discovered in response to a demand by a
16 defendant in an FLSA case for information about other
17 employment of plaintiffs. One such case is Canada v. Hotel
18 Development Texas. It may be cited by the defendants in their
19 papers. I think that's how I learned of it and --

20 MR. GOLDBERG: Yes, Your Honor.

21 THE COURT: -- it's reported at 2008 Westlaw
22 3171940. The fact that dancers declared themselves to be
23 self-employed was admitted as relevant albeit in a state court
24 proceeding in State of Oregon v. Acropolises McLaughlin
25 reported at 945 Pacific 2d 647, an Oregon state court decision

1 although federal cases do indicate that a plaintiff subjective
2 belief may be irrelevant and I'm looking at the Hopkins case
3 cited by the plaintiffs there.

4 So what I distill from all of this case law is that,
5 and you could see where I'm going, the information about
6 income earned is relevant. Whether it's on tax returns or not
7 it needs to be -- the defendants have a right to discover it
8 and if it's on tax returns or if the plaintiffs are -- if the
9 plaintiffs are required to acknowledge in answering that
10 interrogatory that they didn't file tax returns well, the case
11 law says that's okay. In fact, if I protected it and the
12 plaintiffs prevailed and the defendants cited the Schnapkova
13 case, the judgment in plaintiffs' favor might well be
14 reversed.

15 So the first part of my order is that the motion for
16 a protective order is granted insofar as the plaintiffs will
17 not be required to make wholesale disclosure of tax returns,
18 social service applications, mortgage applications, et cetera,
19 but it is denied in that the plaintiffs will be required to
20 produce all documents in their custody and control or
21 possession that reflect any income that they earn as employees
22 or independent contractors and any expenses that they incurred
23 in connection with earning that income during the time period
24 at issue in the complaint.

25 To the extent that those documents contain other

1 information, whether it's a social security number or an A
2 number or a taxpayer ID number or a home address or an alimony
3 payment or a social services predicament, redaction is
4 acceptable to the Court. What's important is that if the
5 document is in the possession, custody or control of a
6 plaintiff and it reflects any income that the plaintiff earned
7 through labor whether as an independent contractor, a sole
8 proprietor or an employee during the time period at issue it
9 be turned over. The fact that it's a tax return or a loan
10 application will not shield it from disclosure.

11 Whether or not any party filed appropriate tax
12 documents may be required of at deposition.

13 With respect to travel, the plaintiffs will meet
14 with their counsel. They will be directed to provide for
15 their own attorney's eyes only all documents in their
16 possession, custody or control including passports that
17 reflect their travel. Counsel in order to protect the
18 immigration status of their clients will prepare a schedule of
19 all the travel that these documents reflect and it will
20 provide that information in the form of an interrogatory
21 answer I deem propounded now for the time period during which
22 the plaintiffs claim they did not receive appropriate wages
23 under law.

24 At the same time that information is transmitted so
25 too will the defendants provide documents responsive to

1 plaintiffs' demands. Tell me how long you need, plaintiffs.
2 I assume the defendants have that material ready to go and so
3 the question is how long the plaintiffs need to respond to my
4 order so that we can set a date for that to happen.

5 MS. WOLTZ: I think we would need about three weeks,
6 Your Honor, in order to contact all of our plaintiffs to get
7 that information.

8 THE COURT: So if that's correct, you should be able
9 to make this disclosure -- why don't we say to be safe by
10 Friday, November 14th. That's three-and-a-half weeks.

11 Do we have a case management order in place that
12 gets depositions going and --

13 MR. GOLDBERG: We did, Your Honor, but that has been
14 mooted by virtue of the protective order application.

15 THE COURT: I know that I was a little short with you
16 on the phone the last time we spoke and a little sarcastic. I
17 regret that. I hope -- you caught me on a bad day but frankly
18 I don't remember. Part of my frustration is one that I've
19 expressed before. I'm looking at eight people sitting around
20 the table in a case that the plaintiffs are going to want
21 fees, the defendants are going to complain they're a small
22 business and they're being ground into a settlement posture
23 that they don't want to take because of the expense of
24 litigation and it is frustrating to me see that and that's why
25 the notion that we're relitigating this issue and I will

1 concede that I was not alert to all of the case law and I'm
2 grateful that I've had the opportunity to educate myself in it
3 but I don't think we're coming out that differently than we
4 were before. So it is a source of some frustration to me to
5 see us finding so much difficulty and so much vitriol over
6 discovery because it portends a long protractive litigation
7 with a lot of lawyers and a lot of time and frankly most of
8 these cases don't involve hundreds and hundreds of thousands
9 of dollars and so we spend more time lawyering it than the
10 claims can economically support because of the artificiality
11 of the fee shifting statute and some of the other issues
12 involved. So that is a source of frustration to me and I hope
13 that we can find a way to move forward more efficiently and
14 with less discovery motion practice and satellite litigation
15 and more accommodation of each other's needs especially when
16 the case law recognizes them.

17 November 14th for the exchange of documents. We
18 have a couple of different groups of plaintiffs. I imagine
19 we're going to have a 216(b) application at some point. Is
20 that in the cards? I don't mean to refer to a statute that
21 you're not familiar with.

22 MS. WOLTZ: Oh, the collective action?

23 THE COURT: Yes.

24 MS. WOLTZ: I think we wanted to -- if I remember
25 correctly from the June 20th conference, Your Honor, you

1 wanted to establish whether or not he dancers were indeed
2 employees before we started that.

3 THE COURT: It seems logical to do that because when
4 I read about the case in your motion papers I get concerned
5 about the fact that the dancers on the one -- similarly
6 situated plaintiffs are a requirement of a collective action
7 and I'm not sure if we have a group of plaintiffs who were
8 paid and apparently given W-2s but complain about
9 discrepancies in their hours and a group of plaintiffs who
10 weren't paid but claimed they should have been that we can
11 call them similarly situated. I haven't contemplated that but
12 it's a complication we won't confront if we have dispositive
13 motion practice on the dancers before we have a 216(b).

14 Now, the other thing we could do is amend and file
15 two separate complaints I suppose and avoid the issue that
16 way. One of the things for the parties to think about is that
17 I suppose if we have dispositive motion practice with respect
18 to the dancers and the defendants win another wave of dancers
19 could come forward and sue. I don't know what the limitations
20 issues are and how they relate to what time frame we're at,
21 but the state law has a six-year statute, right? So that's
22 pretty long.

23 MR. GOLDBERG: Breach of contract, Your Honor.

24 THE COURT: New York State minimum wage law is what
25 I'm thinking has a six-year statute.

1 MR. GOLDBERG: I'm not sure if it's specifically
2 that.

3 THE COURT: The FLSA has a two-year statute, three
4 years for willful if I recall correctly, and the New York
5 State law is six years. On the other hand, I'm not sure
6 216(b) solves that problem because if a plaintiff does not opt
7 in I don't think they're bound by the disposition. It's only
8 an opt in. It's not an opt out. So it may be that absent a
9 Rule 23 motion practice tut, tut, tut, we can't solve this
10 problem anyway.

11 MS. WOLTZ: I think all parties would prefer it if we
12 came to some -- if we could come to a resolution which would
13 obviate the need for all of this. I suppose we're hopeful at
14 this time this is something we could still work out.

15 THE COURT: You're talking about a settlement?

16 MS. WOLTZ: That would be one option.

17 THE COURT: What else did you have in mind?

18 MS. WOLTZ: If the ruling on the dispositive -- on
19 the employee status of the dancers if they all become -- if
20 they all become employees then we only have one class.

21 THE COURT: Well, that's fine with me. Obviously it
22 belays the ultimate resolution of the litigation but it might
23 be a more efficient way to go.

24 So let's say that we exchange these documents on
25 November 14th. How long after that are we going to take to

1 discover the -- to take deps related to the dancers and be
2 ready for motion practice on that issue?

3 MR. GOLDBERG: What Your Honor had directed was not
4 to take all of the dancer plaintiff depositions, select five
5 or so.

6 THE COURT: It makes sense.

7 MR. GOLDBERG: And we're prepared to do that. So in
8 contemplation I would say that we could go forward two weeks,
9 three weeks after we have an opportunity to look at some of
10 the documentation that is provided to us. The beginning of
11 December.

12 THE COURT: How much time do you think it will take
13 to accomplish it?

14 MR. GOLDBERG: It could take five depositions. The
15 problem that we have here is translation. It gets expensive
16 when you need a translator and then ordering transcripts. So
17 I would think probably 45 days. The holiday season and all of
18 that.

19 THE COURT: Right. So first wave of deps will be
20 done by let's say January 23rd and we'll conference the case a
21 week or so thereafter say on February 5th at eleven. Is that
22 agreeable to everyone?

23 MR. GOLDBERG: Yes, Your Honor. An in personam
24 telephone conference?

25 THE COURT: In person. I think with this one I like

1 to get my hands on you.

2 MR. GOLDBERG: Can I address something that you
3 said, Your Honor, in your ruling?

4 THE COURT: Yes, sir.

5 MR. GOLDBERG: You indicated insofar as the redaction
6 part of something that is a tax return or -- you indicated
7 that social services, income generated from social services
8 could be redacted.

9 THE COURT: Yes.

10 MR. GOLDBERG: But I could contemplate and I do
11 contemplate a situation where the social services benefit
12 stems from a claim that they were unemployed.

13 THE COURT: I understand.

14 MR. GOLDBERG: And, therefore, that goes to not only
15 impeachment issues but also what they're -- what they were
16 working for at the time. So I ask you to be sensitive about
17 that issue and --

18 THE COURT: I understand your point but it's one
19 thing to be bound by case law that says that whether you filed
20 a tax return or not is a legitimate cross-examination
21 question. I didn't see in the case laws that the protection
22 that otherwise applies to tax returns can be lifted if the
23 defendant can come up with a potential lie on them and check
24 the tax return to see if it's there or not.

25 MR. GOLDBERG: But you didn't order wholesale

1 production of other documents and we did ask for a document
2 that would relate to a plaintiff who may have made an
3 application to a social services agency for unemployment
4 insurance. If they're unemployed and they received those
5 benefits then how could it be that they're employed by us at
6 the same time unless that plaintiff is not telling the truth?

7 THE COURT: Okay. I understand your point but I am
8 standing by my ruling that says that documents that reflect
9 income earned must be disclosed. You can ask the plaintiffs
10 at their deposition did you receive unemployment benefits
11 during any of this period of time and I'll enforce that
12 question.

13 MR. GOLDBERG: Thank you, Judge.

14 MS. WOLTZ: Can I just ask a clarifying question
15 about is the January 23rd date the date by which all
16 depositions, plaintiffs and defendants are to be done?

17 THE COURT: Yes. That's what I contemplated for the
18 dancer motion practice.

19 MS. WOLTZ: Great.

20 THE COURT: Is dancers an appropriate term to put in
21 the order?

22 MS. WOLTZ: That's fine. They're like hostesses.

23 MR. GOLDBERG: In our original wave of discovery we
24 also included one or two bartenders, employee type. So that's
25 what we intend on doing unless the Court wants to stifle that.

1 THE COURT: I have -- I don't want to stifle anything
2 that moves the case forward faster. If you want to get some
3 of that work done while we're doing this, that's great too.

4 MR. GOLDBERG: Okay. It was mostly going to be done
5 for comparative purposes.

6 THE COURT: That's fine. Anything else?

7 Enjoy your day.

8 MS. WOLTZ: Thank you.

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1 I certify that the foregoing is a court transcript from
2 an electronic sound recording of the proceedings in the above-
3 entitled matter.

A handwritten signature in dark ink, appearing to read 'Shari Riemer', is written over a horizontal line.

6 Shari Riemer

7 Dated: October 23, 2008

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